No. 423.

Br. & Motion for Leave

Filed Feb. 24, 1899.

Supreme Court of the United States.

October Term, 1898.

WILLIAM STEPHENS, MATTIE J. AYERS, et al., Appellants,
vs.
THE CHEROKEE NATION.

No. 423.

Appeal from the United States Court in Indian Territory.

REPLY BRIEF FOR APPELLANTS.

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Reply Brief of Appellants.

1. Act Allowing Appeals to Supreme Court.

The provision in the Indian Appropriation Act of July 1, 1898, confers jurisdiction on this Court to entertain jurisdiction of appeals direct from the United States courts in Indian Territory in all citizenship cases. The cases appealed are all citizenship cases purely. As to the clause in the act in regard to the constitutionality or

validity of any legislation affecting the citizenship of the parties, it was evidently intended to broaden the jurisdiction of the Supreme Court rather than to limit it.

Objection was taken to the jurisdiction of the Dawes Commission, and also to the jurisdiction of court in Indian Territory, upon the ground that the act of Congress conferring the jurisdiction was invalid. But upon a review of the authorities we are convinced that Congress had power to enact the legislation. These appeals will be submitted to this Court therefore upon their merits.

If Congress had wished to send these appeals here upon a jurisdictional question alone, it could and would have said so. The proposed amendment printed in the brief of appellee's counsel proves nothing but that an effort was made to send the cases to the Circuit Court of Appeals first and then here. The legislation prevented this circuity of procedure. There was no way to get these cases into this Court by *certiorari* unless by special act of Congress. If they had been sent to the Circuit Court of Appeals they did not fall within any of the heads or classes of cases made final by section 6 of the Judiciary Act of March 3, 1891. (26 Stat., 826.) They might, where more than $1,000, besides costs, was involved, have been brought to the Supreme Court under the paragraph of section 6 allowing appeals. Congress evidently understood the subject, and gave the parties the benefit of a direct appeal, and provided for an early adjudication of their cases upon their merits.

II. General Statement.

Blood has always been the natural and chief ground of citizenship recognized by the Cherokee tribe. They have, however, in recent years admitted into their tribal citizenship white persons who have intermarried with Cherokees. Nearly all of the appellants in these cases have Cherokee blood, as shown by the findings of facts of the special master in each case.

The others, and there are but few of them, claim the right to citizenship by intermarriage with Cherokees.

A large majority of the appellants have resided continuously in the Cherokee Nation for many years. Some of them for more than twenty years. Mr. Stephens, whose name appears in the title of this case, has resided uninterruptedly in the Cherokee Nation for more than a quarter of a century, having moved there in 1870.

There may be found an appellant now and then who resides outside of the Cherokee Nation, and in such instances the claim to citizenship depends on blood alone, regardless of residence.

There is another class of cases, notably those like the Cobb and Flippen cases, in which the appellants were recognized as citizens by the proper Cherokee authorities, and placed upon the roll, but about a dozen years afterwards their names were stricken off on accusation that they had obtained their enrollment by fraud.

Judge Springer held that the finding of the second Cherokee commission in these cases was *res adjudicata*.

The general questions presented for determination in these appeals may be stated as follows:

1. Claims of appellants to citizenship based on Cherokee blood and *bona-fide* residence in the Cherokee Nation.

2. Claims of appellants who have Cherokee blood, but do not reside in the Cherokee Nation.

3. Claims of appellants who have intermarried with Cherokees and have maintained a *bona-fide* residence in the Cherokee Nation.

4. Claims of appellants who have once been placed upon the roll as having Cherokee blood, but afterward stricken off upon charge of fraud. These appellants have been residents of the Nation for many years, and are Cherokees by blood.

The findings of the special master of the court below show the facts in each case.

The United States courts in Indian Territory heard, *de novo*, citizenship cases of persons belonging to the different tribes.

Judges Springer, Townsend, and Clayton differed as to what constituted qualifications for citizenship. Upon the questions presented Judge Springer held that blood alone is not the test of citizenship in the Cherokee Nation; that *bona-fide* residence in the Nation is essential; and it seems that he holds that the enrollment of the applicant for citizenship, or the enrollment of some of his ancestors, is a necessary qualification.

Judge Clayton holds that both residence and blood

are requisite qualifications to citizenship in the Choctaw Nation.

Judge Townsend holds that non-resident Choctaws and Chickasaws who have properly filed their applications and established their membership of the tribes shall be admitted to citizenship.

The diversity of the decisions of the judges of the courts in Indian Territory probably had its influence in bringing about the legislation of Congress allowing appeals to this Court. Like diversity of opinion has been held of sufficient gravity and importance in another branch of the jurisdiction of this Court to justify the issuance of a *certiorari*.

Columbus Watch Co. *v.* Robbins, 148 U. S., 266.

III. Statement as to Appellant Stephens.

Stephens, the appellant in this case, moved into the Cherokee Nation, with his mother, in 1870, and has resided there continuously ever since. His children and grandchildren have been reared there. He moved into the Nation upon an invitation of Chief Downing asking all Cherokees to return to their people and home. (Rec., 3.) The special master finds this to be a fact. (Rec., 46.) In 1873 appellant applied to be admitted to citizenship in the Cherokee Nation. (Rec., 3, 14.) His claim was under consideration until 1887. (Rec., 14.) In the meantime the Cherokee council had been engaged in passing enactments concerning the citizenship roll. Many Cherokees had, no doubt, accepted Chief Downing's invitation, and, like Mr. Stephens, had acquired

equitable rights, at least, in the Cherokee Nation. In June, 1887, the citizenship commission took up Mr. Stephens' claim, and declined to admit him to citizenship upon the authority of an act of the council passed in 1886. (Rec., 14.) The appellant had then been seeking his right as a citizen for thirteen years, and acquiring property interests in the Nation. The commission practically admitted his right to be placed on the citizenship roll. It said in its opinion:

> "We are, however, satisfied from the testimony in this case that William Stephens, the applicant, possesses Cherokee blood, as his uncle, William Ellington Shoe Boots, appears on the now resident old-settler rolls of Cherokees of the year 1851, and that he (William Shoe Boots) is the son of old Te-as-ki-yarga, a Cherokee Indian, who died before the treaty of 1835, who was the grandfather of the applicant, William Stephens." (Rec., 14.)

Afterwards the commission reconsidered its action and reported Mr. Stephens' case to the Principal Chief, as the following record attests:

> "The above case reconsidered by the commission and reported to the Principal Chief, the same as in the Sayer case, page 197 of this book."

The commissioners transmitted the case to the Principal Chief, and in their letter admitted that they were satisfied that Stephens possessed Cherokee blood, but could not be admitted by them on account of the technical provisions of section 7 of the act of 1886, and as another year had elapsed they included a reference to a new act passed in 1888. (Rec., 16.)

Principal Chief Mayes referred the case in November, 1890, and said:

"*To the Honorable National Council.*

GENTLEMEN: I herewith send papers setting forth the claim of William Stephens to Cherokee citizenship. While it is your duty to reject all fraudulent claims to citizenship, you should be willing to extend to all our race the same rights with ourselves, as this country was intended for homes for the Cherokee people.

You will perceive the report of the commission on citizenship, addressed to me, gives a clear statement of Mr. Stephens' status as a Cherokee, and it was only a technical reason why he was not admitted by said commission.

His right to citizenship by blood was admitted by this commission. Under circumstances connected with the matter, you will find that the commission court was thoroughly satisfied with the genuineness of his claim, and another thing speaks in favor of Mr. Stephens' claim—he has never joined the notorious 'Citizenship Association,' but has modestly relied on what he has just cause to believe to be his rights. No doubt his claim is a just one.

Very respectfully,

J. B. MAYES,
(Rec., 16, 17.) *Principal Chief C. N.*"

The committee of the council to whom the matter was referred recommended the admission of Mr. Stephens and his family to citizenship, and reported a bill for that purpose, which, for some reason, was never passed. (Rec., 20.) Stephens has not been admitted to citizenship, nor has his claim been rejected. Stephens was permitted to vote. (Rec., 47.) The facts show a species of bad treatment, considering the unanimous admission as to

Stephens' rights, that could not exist elsewhere than in the Cherokee Nation.

And when the case reached the court the special master found the facts in favor of Stephens. (Rec., 46.) And Judge Springer accepted the findings of the special master. (Rec., 80.) A new question was raised in the United States Commission and court, namely, that Stephens had negro blood in his veins. The master found this not to be so. (Rec., 47.) The master's finding in this respect was accepted by Judge Springer. (Rec., 50.)

We have reviewed the facts in this case, because counsel for appellee attempts to mislead by making extracts from the evidence, and placing upon it a construction that may be considered malicious in the face of the facts. We think the case is controlled in this Court by the findings of the master. No exceptions were taken to these findings in the court below, and it is too late to take them now. Besides, Judge Springer has, in express terms, accepted the findings of the master on the points so vehemently discussed in the brief of counsel. We shall insist that the findings of the master control in all of these cases, in the absence of exceptions, objections, and rulings thereon, except as to such exceptions as may appear on the face of the report. This has been the rule since the decision in *Himely* v. *Rose*, 5 Cranch, 313.

See, also—

Harding *v.* Handy, 11 Wheat., 103, 126;
Story *v.* Livingston, 13 Pet., 359, 356;
Tilgman *v.* Proctor, 125 U. S., 136.

After the Cherokee people settled in Indian Territory they adopted a constitution, in which occurs the following provision:

> "Whenever any citizen shall remove with his effects out of the limits of this Nation and becomes a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: *Provided*, nevertheless, that the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the Nation on memorializing the national council for such readmission."

Judge Springer has applied this provision to Mr. Stephens and other appellants. (Rec., 51.) The provision is not retroactive, but applies only to "citizens" of the Cherokee Nation in the Indian Territory who shall remove with their effects out of the limits of that Nation and become "citizens" of some other government. There is nothing to show that Stephens, or the other claimants to whom Judge Springer has applied the provision, ever left the Nation in Indian Territory in violation of this constitutional provision, or that they ever became citizens of any other government. This new constitution superseded all former constitutions of the tribe. Its provisions only apply to such citizens as departed from the Nation after its adoption and became "citizens" of some other government. The distinction is marked between a resident of a government and a citizen thereof. And there is such a thing as not being a citizen at all.

Elk *v.* Wilkins, 112 U. S., 94.

The court below takes the ground that because the mother of the principal claimant was born in Kentucky, and married the father of the principal claimant in Ohio, that her status was fixed thereby as a resident of Ohio, and that she lost her citizenship in the Cherokee Nation. This position is taken for the purpose of applying to the appellants the provision of the new constitution, quoted above, in regard to readmission to citizenship. (Rec., 51.) This position is new in this case. No such objection has been raised in the proceedings in the Cherokee Nation. It is raised by Judge Springer for the first time in the record. There is ample proof, and convincing admissions in the record, that the appellants in this case have the Cherokee blood to entitle them to citizenship. It is also fully shown and admitted that they would have been made citizens except for a legal technicality.

We do not agree with the opinion upon the point that Stephens lost his citizenship by reason of his mother's marriage in Ohio. If this had been so, the authorities of the Cherokee Nation would have imposed the objection instead of waiting for Judge Springer to do so. The status of Stephens as to citizenship in the Cherokee Nation, and among the Cherokee people, is that of the mother, who had the Cherokee blood, and not of the father according to the laws, usages, and customs of the Cherokees. This has been the universal rule among the Cherokees, and this rule has been generally followed in the Executive Departments of the United States Govern-

ment. The status of the child follows the blood wherever it exists.

Counsel for appellee is inclined to ridicule the marriage of Stephens' mother. (Brief, 85.) For the sake of the argument, we are willing to let the proof show just what counsel contends for, and, no matter what the facts may be, aside from such proofs, if the alleged father was a part of a devised story, and had no existence as claimed, and the appellant in this case never knew him, for the reasons intimated, the status of the appellant Stephens would be settled beyond question.

Alberty *v.* United States, 162, U. S., 499, 501;
Fowler *v.* Merrill, 11 How., 375;
Williamson *v.* Daniel, 12 Wheat., 568.

IV. Time of Perfecting Appeals.

Counsel for appellee says some of the appeals were not perfected in time, because they were not docketed in this court within 120 days after the passage of the act allowing such appeals. We do not understand this to be the law or the rule. An appeal is perfected when it is presented to the court which rendered the decree or judgment appealed from, in such manner as to put an end to its jurisdiction over the cause, and make it its duty to send the case to the appellate court. A writ of error is brought when it is filed in the court which renders the judgment. The same rule applies to appeals.

Credit Co. *v.* Ark. Cent. Railway, 128 U. S., 258;
Aspen Mining Co. *v.* Billings, 150 U. S., 31.

V. Trials de novo and Vested Rights.

Some question has been raised, probably by all parties, as to the jurisdiction of the United States court in Indian Territory, for the reason that an appeal would not lie from the commission to the court. The legislation of Congress is in perfect accord with previous acts of Congress in this respect, and is so well settled that it seems scarcely necessary to refer at length to such legislation and to the decisions of the Supreme Court by which it is given its proper construction, effect, and enforcement. Congress fully understood, from many precedents, the scope and character of this legislation when it enacted it.

Judge Springer, in the light of former legislation upon the subject and the decisions of this court, also gave the act here under discussion its proper construction. He immediately announced rules in his court specially governing the procedure in citizenship cases, in which provision is made for hearing and determining the cases *de novo*. (Printed record in Cobb case, p. 143.)

The contention in this regard is not new, and is based upon a class of cases that have been uniformly distinguished from the line of cases to which the case at bar belongs.

In Ritchie *v.* United States (17 How., 525), it was insisted that the United States courts had no jurisdiction, because the case was transferred by appeal from a commission which was a non-judicial body to the court. This Court sustained the jurisdiction of the courts, and said :

> "But the answer to the objection is, that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in the court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case *de novo* upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce." (P. 534.)

Hundreds of land claims were heard and determined in the United States courts in California under the decision in Ritchie's case, some of which were appealed to this Court. A table of these land cases, showing the disposition made of them, may be found in volume 30 of Federal Cases, commencing at page 1217.

The Supreme Court also refers in the opinion in Ritchie's case to analogous proceedings before the United States court under section 1 and section 3 of an act of Congress of May 26, 1824 (4 Stat., 52, 53), concerning French and Spanish claims in Missouri, which had previously been heard before a commission.

Provision is made by section 16 of the act of Congress to regulate commerce (24 Stat., 379), for the transfer of cases from the Interstate Commerce Commission to the United States court. The question of jurisdiction was raised in the United States Circuit Court in *Kentucky and Indiana Bridge Co.* v. *Louisville and N. R. Co.* (37 Fed.

Rep., 567, 610, 615); and Mr. Justice Jackson followed the decision in *United States* v. *Ritchie*, (17 How., 525), and said:

> "The rule laid down in that case is directly applicable to the present proceedings, and sustains the construction which we place upon the provisions of section 16 of the law under consideration."

In Cherokee Nation *v.* Kansas Railway Co. (135 U. S., 641) this Court passed upon exactly the same question. Congress passed an act to grant the railroad company the right of way through the Indian Territory (23 Stat., 73), and provided in section 3 for the appraisement of property by disinterested referees to be appointed by the President.

Provision was also made in the same section for an appeal to the courts from the finding of the referees by filing an original petition in the court and for a trial *de novo*. (Pp. 643, 644.) The Supreme Court sustained the appeal or proceedings in the District Court, and also the appeal of the Cherokee Nation to this Court.

The decisions above noted and the legislation upon which they rest are sufficient to settle the question here presented in this respect.

VI. Appeals provided for by law after final judgment or decree.

In Calder *v.* Bull (3 Dallas, 386) this Court held that a resolution or law of the State of Connecticut, setting aside a decree of the probate court, and granting a new hearing before the same court, with liberty of appeal to

the Superior Court and from that court to the Supreme Court of Error of the State, being the highest tribunal of the State, was held not to contravene the Constitution of the United States. A distinction is drawn in this case between legislative judgments and remedies provided by law. The law of Connecticut, allowing the appeal, was not prohibited by the Constitution of the United States.

In Sampeyreac *v.* United States (7 Peters, 222) an act of Congress (4 Stat., 399), authorizing the Superior Court of the Territory of Arkansas to entertain jurisdiction of a bill of review to revise certain decrees which were final, it was held by the Supreme Court, on appeal, that the act giving the new remedy by bill of review was constitutional, and that Congress had power to mold this remedy and dispense with technical rules concerning bills of review. It will be noted that this was Congressional legislation in reference to decrees in Territorial courts, as in the case at bar.

In Freeborn *v.* Smith (2 Wall., 160), the facts show that the act of Congress admitting the Territory of Nebraska into the Union as a State did not provide for prosecution of the appeals then pending in the Supreme Court from that Territory. In other words, the remedy in such cases was suspended. Legislation was absolutely necessary to revive the remedy. It may be that such legislation is retrospective, but there is nothing in the Constitution forbidding retrospective legislation in relation to remedies. It seems to be well settled that, in such cases, where there is no direct constitutional pro-

hibition Congress or the legislature of a State may pass retrospective laws affecting remedies. Such acts are of a remedial character, are peculiar subjects of legislation, and are not liable to the imputation of being assumptions of judicial power.

In Freeland *v.* Williams (131 U. S., 405–420) the question arose upon an act of the legislature founded upon the Constitution of West Virginia of 1872. The Constitution of the State declared that citizens should not be liable upon judgments or decrees previously rendered and growing out of acts connected with the civil war. The act of the legislature provided a remedy which, in effect, neutralized or rendered inoperative all such judgments and decrees. This is a case of tort. The retrospective provisions of the Constitution and of the act of the legislature were upheld as remedial, and as not interfering with vested rights.

In this case the Court says:

> "Prior to the adoption of the Fourteenth Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded." (Calder *v.* Bull, 3 Dall., 386; Satterlee *v.* Matthewson, 2 Pet., 380; Sampeyreac *v.* United States, 7 Pet., 222; Watson *v.* Mercer, 8 Pet., 88; Freeborn *v.* Smith, 2 Wall., 160.) "In the latter case Mr. Justice Grier, when the Congress of the United States had allowed an appeal where the judgment would have otherwise been final, used this language: 'If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment.' And he thus quotes the language of Chief Justice Parker, in Foster *v.* Essex Bank, 16 Mass., 245:

> 'The truth is there is no such thing as a vested right to do wrong, and the legislature which, in acts not expressly authorized by the Constitution, limits itself to correcting mistakes *and to providing remedies for the furtherance of justice*, can not be charged with violating its duty or exceeding its authority.'"

It is added in the opinion that many other cases might be cited in which retrospective statutes, when not of a criminal character, though affecting the rights of parties in existence, are not forbidden by the Constitution of the United States. The remedy provided by the Constitution and legislation of West Virginia was upheld.

It will be observed that Satterlee *v.* Matthewson (2 Pet., 380) is approved in express language in the opinion in Freeland *v.* Williams, and that Watson *v.* Mercer is also cited. In fact all of the cases that were decided prior to the Fourteenth Amendment are cited in the opinion of the court, apparently with approval, and with the suggestion "that many other cases might be cited," etc. This will answer a paragraph on page 11 of appellee's brief.

In Garrison *v.* City of New York (21 Wall., 196, 205), in which the Supreme Court passed upon the question of a vested right in a judgment, an act of the legislature of the State of New York allowing an appeal, which was a new remedy, two months after the judgment became final, was sustained. The Court said:

> "There is no such vested right in a judgment in the party in whose favor it is rendered as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed."

This is one of the cases quoted from and relied on in Freeland *v.* Williams (131 U. S., 405, 420).

VII. Power of Congress to make Laws, etc., for Cherokee Nation.

It is admitted that Congress may legislate for the Cherokee Indians and concerning them in such manner as it may deem proper, subject only to the Constitution of the United States.

This right and power of the United States was retained in the first treaty made with the Cherokees, and has never been abrogated or abandoned. On the contrary, Congress has at all times passed such laws, in its discretion, as the interest of the United States and the Cherokees required.

In fact, the Congress has always managed the affairs of the Cherokees by such laws as were deemed necessary, and the government of these people is now controlled, as far as desired, by legislation of Congress. Indian Territory, and the respective Indian nations embraced in it, comprise a Territory simply, and the local laws are only entitled to such respect as are given to the laws of other Territories. Congress may abrogate them at will. As a matter of fact, the power of Congress over the Cherokee Nation is twofold, inasmuch as it exercises its authority, (1) by constitutional grant, and (2) by a treaty stipulation in which it is authorized to manage all of the affairs of the Cherokee Nation. Only the first grant of power applies ordinarily to the territory of the United States.

This being so, the local laws of the Cherokee Nation

are not entitled to the same respect in their application and construction as the laws of States.

There is quite a difference in a law that can be abrogated by act of Congress and one that requires judicial procedure to declare its repugnancy to the Constitution or laws of the United States.

Congress has never provided by law for testing the laws of the Cherokee Nation as to Federal questions, as it has done in the States, for the reason that Congress has itself retained and exercised control over such territorial legislation of the Cherokees. It was never intended to erect a State for any purpose whatever out of the Cherokee Nation, but the contrary is apparent from the provisions of the treaties, the legislation of Congress, and the general management of the affairs of that Nation by the Executive Departments of the United States.

In this view of the case, we think Judge Springer has erred in his decisions in the citizenship cases in construing the legislation of the Cherokee Nation, and applying to it "the same general principles of statutory construction which should be applied to the statutes of any of the States of the Union." No matter what construction may be given to an act of the Cherokee council by a Cherokee court, the Congress may approve, abrogate, or disregard the law and its construction; but Congress can not do this with a statute of a State. Congressional control and construction of laws and decisions is one thing, a judicial construction is quite a different thing. But let us examine some of the decisions of this Court upon the subject.

Judge Springer relies upon the case of the Eastern

Band of Cherokee Indians *v.* United States (117 U. S., 288), which is also entitled "The Cherokee Trust Funds." He quotes extensively from the opinion of this Court and from the opinion of the Court of Claims.

The Eastern Band of Cherokees resided in the States and never removed, individually or collectively, to the Cherokee Nation in Indian Territory. They contended that they were entitled to share in certain funds of the Cherokee Nation in Indian Territory, upon their view of the terms of the treaty, no matter where they resided. Upon the question presented, the Attorney General, and this Court, and the Court of Claims held that if Indians residing in the States wish to enjoy the benefits of the common property of the Cherokee Nation they must comply with the Constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided; that they can not live out of the Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. The decision was rendered in this Court March 1, 1886; the decision of the Court of Claims was rendered June 1, 1885; the act of Congress authorizing the suit was passed March 3, 1883.

Many of the appellants in these citizenship cases were residing in the Cherokee Nation when the law was enacted authorizing the suit of the Eastern Band and when the decisions in the courts were rendered. Some of them had applied for citizenship, and others had been put on the rolls years before and were about that time stricken off. Of course the decision relating to the Eastern Band

of Indians does not apply to this class of Cherokees. That decision relates to a band of Indians who resided in the States, and who insisted that they had the right to reside there and also share in the funds of the Nation in the Indian Territory. They were contending for a property right in certain funds of the Cherokee Nation, regardless of their residence and citizenship; the appellants in these cases are contending for the right of citizenship only, and their claim is based on Cherokee blood or Cherokee blood and residence. And some of the appellants in these appeals removed into the Cherokee Nation, after the decision in the Eastern Cherokee Band case, for the express purpose of complying with the law there announced.

The proposition that the Cherokee Nation is a State or a sovereign like the United States, has been persistently presented at all times by the Cherokees; but it has been uniformly denied by the decisions of this Court and other tribunals of the United States. Judge Springer alone has recognized the laws of the Cherokee Nation to be on the same footing, for any purpose whatever, with the laws of the States, and we may add of the United States.

We shall not go over all the cases in which this Court has turned down the alleged sovereignty of the Cherokee Nation as compared to the sovereignty of the States and of the United States.

In the Cherokee Nation *v.* Kansas Railway Co. (135 U. S., 641, 653) the proposition was presented, on behalf of the Cherokees, that the Cherokee Nation is sovereign

in the sense that the United States are sovereign, or in the sense that the several States are sovereign. In response to the modest claims of the Cherokee Nation in this respect, this court reviewed the former decisions upon the subject, commencing with Cherokee Nation *v.* Georgia, 5 Peters, 1, and including Worcester *v.* Georgia, 6 Pet., 515, 557, 569; United States *v.* Rogers, 4 How., 567, 572; United States *v.* Kagama, 118 U. S., 375, 379; Choctaw Nation *v.* United States, 119 U. S., 1, 27, and many others.

According to the conclusion from these opinions the Cherokee Nation and other Indians in the Territory who are pleased to designate themselves "Nations," are "Indian tribes," simply, and nothing more; they are dependent political communities, subject to the paramount authority of the United States. They are no more entitled to statehood or to have their local ordinances construed as are the laws of States than are the Apaches, the Comanches, the Mescaleros, or other bands and tribes.

By section 1 of the act of March 3, 1871 (16 Stat., 566), now section 2079 of the Revised Statutes, Congress took away all recognition of independence of Indian nations and tribes.

The doctrine announced in Cherokee Nation *v.* Kansas Railway Co., 135 U. S., 641, was affirmed in Talton *v.* Mayes, 163 U. S., 376, 382, in passing upon a question of practice in regard to the laws of the Cherokee Nation concerning the constitution of the grand jury.

VIII. Power of Dawes Commission under the Act of Congress, etc.

The contention that the Dawes Commission was sent to the Indian Territory simply for the purpose of making up a complete roll of the citizens of the Cherokee Nation seems to absurd too admit of discussion in the face of the act of Congress.

The fact that enrollment had been denied for years to Cherokees who were entitled to it, and the further fact that such Cherokees had been put on and off the roll at the pleasure of those in authority, led Congress to enact a law taking the question of citizenship out of the control of the Cherokee authorities, either directly or by appeal to the courts of the United States. The abuse of the roll became notorious.

The Dawes Commission was appointed to negotiate for the extinguishment of the tribal title to the lands. In investigating matters, the Commission acquired knowledge of the abuse and manipulation of the citizenship roll, and reported the facts to the Secretary of the Interior. The Secretary embodied the report of the Dawes Commission in his report to the President, and it is a part of Exhibit A. The report of the Commission consequently reached Congress at its December session, 1895. On June 6, 1896 (29 Stat., 321), Congress passed the act conferring jurisdiction on the Dawes Commission in citizenship cases.

In order to advise this court of the reasons for the legislation taking the citizenship out of the control of

Cherokee authorities, we reprint the statement of the Commission as it is found at pages 91 and 92 of the report of the Secretary of the Interior for 1895. The language of the Dawes Commission is as follows:

> "Citizenship in these nations has been left by the National Government entirely under the control of authorities in the several existing governments.
>
> The citizenship roll of the Cherokees has dealt with a larger number than any of the others, affecting, as it does, all North Carolina Cherokees who desire to become a part of the Nation, and a more liberal policy of adoption by intermarriage and otherwise than exists in the other tribes.
>
> A tribunal was established many years ago for determining the right of admission to this roll, and it was made up at that time by judicial decision in each case. Since that time and since the administration of public affairs has fallen into present hands, this roll has become a political football, and names have been stricken from it and added to it and restored to it without notice or rehearing or power of review, to answer political or personal ends, and with entire disregard of rights affected thereby. Many who have long enjoyed all the acknowledged rights of citizenship have, without warning, found themselves thus decitizenized and deprived both of political and property rights pertaining to such citizenship. This practice of striking names from the rolls has been used in criminal cases to oust courts of jurisdiction depending on that fact, and the same names have been afterwards restored to the roll when that fact would oust another court of jurisdiction of the same offense. Glaring instances of the entire miscarriage of prosecutions from this cause have come to the knowledge of the commission, and cases of the greatest hardship affecting private rights are of frequent occurrence. This practice is persisted in in defiance of an expressed opinion of the Attorney General of the United States forwarded to this Nation on a case presented that it was not in

their power to thus decitizenize one who has been made a citizen by this tribunal clothed by law with the authority. There is no remedy but an interference of the United States.

The 'intruders' roll' is being manipulated in the same way. This 'intruders' roll' is the list of persons whose claim to citizenship is denied by the Nation, and who, by the agreement in the purchase of the 'Cherokee Strip,' the United States are to remove from the Territory by the 1st of January next. This roll is now being prepared for that purpose by the Cherokee authorities in a manner most surprising and shocking to every sense of justice, and in disregard of the plainest principles of law. The chief assumes to have authority to 'designate' the names to be put upon the intruders' roll, and names are, by his order, without hearing or notice, transferred from the citizens' roll to that of intruders, so that, on January 1, 1896, the United States will be called upon to remove from the Territory, by force if need be, thousands of residents substantially selected for that purpose by the chief of the Nation. It has been made clear to the commission that the grossest injustice and fraud characterize this roll. Persons whose names have been upon the citizens' roll by the judicial decree of the tribunal established by law for that purpose for many years, some of them for twenty or more, persons who have enjoyed all the rights of citizens, unquestioned by any one until distribution per capita of the strip money, have been, by the mere 'designation' of the chief, stricken from the citizens' roll and put upon that of intruders, with notice to quit before January next. Children of such parents, born in the Nation, now of age, with families and homes of their own, are receiving this notice to leave forever all they have earned and the homes they have built for themselves, and this at the will of the chief alone. If the United States Government removes such persons it will become a participant in this fraud and injustice, for which ignorance alone can form any excuse. The commission

feel it a duty to call attention to these facts, and invoke the direct intervention of the Government to prevent the consummation of this great wrong.

These remarks apply specially to the Cherokee Nation, with which the United States has recently entered into obligations in respect to 'intruders.' But much of what is here said is applicable also to the condition of affairs in the other nations. In these nations many persons coming to the Territory by invitation of the governments themselves, or under the provisions of the laws enacted by them, and acquiring citizenship, with homes and property, in conformity to such laws, have been in many instances stricken from the rolls of citizenship by those in power for political and personal purposes, and laws enacted and other means resorted to to deprive them of the homes and property acquired.

The commissson is of the opinion that if citizenship is left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary."

The above is what influenced Congress in enacting the legislation upon the subject, and nobody can well question the necessity for it. To say Congress, in view of the facts, authorized the Dawes Commission simply "to make a complete roll of all Cherokee citizens," without hearing and determining the cases, is to accuse Congress of having done a vain and foolish thing. Besides, Congress, by the very act conferring power on the commission "to proceed at once to hear and determine the applications of all persons who may apply to them for citizenship," also confirmed *the existing rolls of citizenship* in the Cherokee Nation.

Our construction of the act of June 10, 1896, is that Congress confirmed the existing roll with such additions as might be added to it by applications to the Cherokee court or commission according to the provisions of the act. And this construction is, in effect, given to the act by the act of June 7, 1897. Applicants could elect whether they would go to the Cherokee court or commission, or to the Dawes Commission, and in either case there was a right of appeal to the United States court. The object of Congress was to take the question of citizenship, either directly or indirectly, away from the Cherokee authorities in order that exact justice and equity might be done the claimants.

Provision is made by the act, (1) for a hearing and determination of the applications of persons entitled to citizenship, and to determine the right of such applicants to be admitted and enrolled. Complete jurisdiction is conferred on the commission. The other provisions of the act relate to procedure before the commission, and it is to be presumed they were followed. The commission, not the United States courts, was required to respect all laws of the Cherokee Nation or tribe not inconsistent with the laws of the United States, and all treaties with that Nation or tribe, and give due force and effect to the rolls, usages, and customs. The commission was also given power to administer oaths and take testimony, etc.

These rules of procedure were prescribed especially for the guidance of the commission, which was a temporary tribunal. When the cases reached the United States courts, they were tried *de novo*, and the general

rules of practice and procedure applied to them. The procedure prescribed for the Dawes commission had served its purpose.

Just what consideration or respect is to be given to the laws, usages, or customs of the Cherokee Nation in the matter of citizenship cases here is a question for this Court to determine, regardless of the provisions of the act of June 10 conferring powers on the commission in this respect.

It will be an interminable task to undertake to construe, understand, or reconcile the laws and other acts of the Cherokee Nation. They seem too numerous to mention.

Judge Springer mentions quite a number of them, and then says *numerous* other acts in reference to citizenship were passed from time to time by the national council.

The truth is the acts of the council in this respect were so frequent and so different that it was scarcely worth while to make application for citizenship under them. For instance, Mr. Stephens, the appellant in this case, made application for citizenship in 1873, and was trifled with until 1887, and was refused admission under a section of a law passed by the council in 1886. (Rec., 3, 14.)

Under all these circumstances, there is but one way to assure justice to the appellants and that is to determine these cases under the provisions of the laws of the United States, *de novo*, regardless of the jumble of citizenship laws of the Cherokee Nation. Congress

evidently intended this should be done, and it is the only way to do equity in the cases.

(2) The provision of the act conferring jurisdiction on the court or commission of the Cherokee Nation need not be specially referred to, as none of these appeals fall under it.

Respectfully submitted.

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